

CANADA / JUDGMENT

Fritz v. Paton

2020 BCSC 1541

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2020 BCSC 1541 Fritz v. Paton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fritz v. Paton,

2020 BCSC 1541

Date: 20201019

Docket: S175720

Registry: Vancouver

Between:

Elizabeth Fritz and Allan fritz

Plaintiffs

And

Sophia Paton and Katarina Stilinovic

Defendants

And

Katarina Stilinovic

Defendant by Counterclaim

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

September 8-11,

and 14-15, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 19, 2020

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Introduction

- [1] This unfortunate case involving four family members concerns the enforceability of a contract for the sale of land located at 3050 28th Street in Langley, British Columbia (the "Property").
- [2] The defendant Katarina Stilinovic is the mother of the co-defendant Sophia Paton. The plaintiff Elizabeth Fritz is the daughter of Ms. Stilinovic and Ms. Paton's half-sister. The plaintiff Allan Fritz is Ms. Fritz's husband.
- [3] The Property was originally purchased by Ms. Stilinovic and her then husband and subsequently sold to Ms. Paton and her then boyfriend. In 2007 Ms. Paton's boyfriend sold his 50% interest to Ms. Stilinovic. Ms. Paton and Ms. Stilinovic currently own the Property as tenants in common, each having an undivided 50% interest.
- [4] Although discussions regarding a potential sale of the Property to the Fritzes started in or about 2010, in an agreement of purchase and sale dated June 7, 2013 Ms. Paton and Ms. Stilinovic agreed to sell the Property to the Fritzes for \$800,000 (the "Sale Agreement"). The sale transaction did not complete.
- [5] The Fritzes had previously paid Ms. Paton a deposit totaling \$50,000 in two installments. Ms. Paton has retained the deposit.
- [6] On March 24, 2015 Ms. Stilinovic brought an application in a petition proceeding for an order allowing her to sell the Property to the Fritzes. By order dated April 18, 2015 Justice Wedge ordered that the Property be marketed and sold through a licensed real estate agent. The order of Justice Wedge was never enforced.
- [7] On April 9, 2015 the Fritzes brought an action for specific performance of the Sale Agreement. Ms. Stilinovic did not oppose the relief sought by the Fritzes. In reasons for judgment released December 14, 2016 (2016 BCSC 2328), Justice Kelleher found that the Sale Agreement was valid and enforceable and continued in force - on the basis that both of the parties were not ready to close by the closing date, which he found was July 15, 2013. He denied the Fritz's request for an order for specific performance but ordered that either the buyers, the Fritzes or the vendors, Ms. Stilinovic and Ms. Paton, could set a new closing date on reasonable notice to the other party.
- [8] On December 22, 2016 the Fritzes gave notice to counsel for Ms. Stilinovic and counsel for Ms. Paton, who were each separately represented, of a new closing date of February 2, 2017. Ms. Paton refused to close on February 2, 2017 for reasons related to Ms. Stilinovic's decision to grant a deed of gift to Ms. Fritz in the amount of \$200,000, which the Fritzes and Ms. Stilinovic sought to apply as a credit against Ms. Stilinovic's 50% share of the \$750,000 balance remaining on the purchase price.

- [9] Ms. Stilinovic supported and continues to support the sale of the Property to the Fritzes and was on February 2, 2017, and remains, ready, willing and able to close.

The Petition, Claim, Counterclaim and Third Party Notice

- [10] By Petition filed in March 2017 (Petition No. S171463) Ms. Paton seeks an order pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347 for sole conduct of the sale of the Property on the basis that, amongst others, the Fritzes were not ready, willing and able to close on February 2, 2017.
- [11] By Notice of Civil Claim filed June 15, 2017 (Action No. S175720), as amended, the Fritzes seek specific performance of the Sale Agreement. That is, they wish to enforce their contractual right to purchase the Property.
- [12] At a case planning conference on January 22, 2018 Master Dick ordered that the petition and this action be consolidated for all purposes and that Ms. Paton shall be at liberty to assert the allegations raised in the petition in this Action.
- [13] On August 1, 2018 Ms. Paton filed a counterclaim against the Fritzes and Ms. Stilinovic in this action seeking, amongst other things, an order for private sale of the Property and use and occupation rent from both the Fritzes and Ms. Stilinovic starting December 1, 2013 to the date of judgment.
- [14] On August 8, 2018 Ms. Stilinovic filed a Third Party Notice against Ms. Paton. In the event that this Court orders a sale of the Property Ms. Stilinovic seeks an order confirming Ms. Paton's responsibility for payment of all or some of a \$516,000 debt secured by an RBC mortgage on the Property (the "RBC Debt").

Summary of Issues

The Fritz's Claim for Specific Performance

- [15] The main issue in this action is whether the Fritzes are entitled to specific performance of the Sale Agreement. It is their position that by refusing to complete the Sale Agreement on February 2, 2017, Ms. Paton repudiated the Sale Agreement, which repudiation they did not accept, entitling them to specific performance.
- [16] One of the requirements for a claim of specific performance, which is an equitable remedy, is that the claimant demonstrates that subject property "is unique to the extent that a substitute would not be readily available and that there is a fair, real and substantial justification for the decree that is being sought": *Ali v. 656527 B.C. Ltd.*, 2004 BCCA 350 at para. 23 referring to *Semelhago v. Paramedevan*, [1996] 2 S.C.R. 415 at paras. 21-22.
- [17] During the trial the Fritzes tendered evidence that the Property was unique for reasons including the fact that it had been "in the family" for many years and that animals with whom the Fritzes were close were buried there. Ms. Paton concedes that the requirement of the Fritzes to demonstrate uniqueness of the Property in support of their claim for specific

performance had been met. I find that the Fritzes have demonstrated that the Property is both subjectively and objectively unique and that damages would not be an appropriate remedy in this case.

- [18] What remains to be decided with respect to the Fritz's claim for specific performance is the following:
- a) Whether the Fritzes have proven that they were ready, willing and able to close on February 2, 2017?
 - b) Even if the Fritzes demonstrate that they were ready, willing and able to close on February 2, 2017 was Ms. Paton justified in refusing to do so on that date?

Ms. Paton's Claim for Occupation Rent

- [19] The second issue concerns Ms. Paton's claim for occupation rent. During this trial Ms. Paton abandoned her claim for occupation rent against the Fritzes and confirmed that she was only seeking occupation rent against her mother, Ms. Stilinovic.
- [20] This is not the first time a claim for occupation rent has been advanced by Ms. Paton. On the first day of the first trial before Justice Kelleher, September 6, 2016, Ms. Paton discontinued her counterclaim against Ms. Stilinovic for occupation rent, on a without costs basis. As a result of this earlier discontinuance, with respect to Ms. Paton's renewed counterclaim for occupation rent payable by Ms. Stilinovic, the issues to be decided include the following:
- a) Is Ms. Paton prevented from advancing this claim by application of the principles of res judicata, issue estoppel and abuse of process?
 - b) If not, does Ms. Paton's claim for occupation rent succeed or fail on the merits?

Ms. Stilinovic's Claim for Payment of RBC Debt/Distribution of Net Sale Proceeds

- [21] If the order for specific performance is granted and the Property is sold there is no dispute that the sale proceeds must first be applied to pay off the RBC Debt. The final issue to be decided therefore, is whether Ms. Paton is liable to Ms. Stilinovic in respect of repayment of the RBC debt, made using Ms. Stilinovic's share of the proceeds from the sale of the Property, and if so, in what amount?

Background Facts

- [22] I do not intend to repeat all of the background facts which are set out in the reasons for judgement of Justice Kelleher dated December 14, 2016 (2016 BCSC 2328). I will set out relevant background facts, focussing primarily on the events leading up to February 2, 2017. In this respect, I refer to the evidence adduced at trial which includes witness testimony, admissions and agreed facts and the documentary evidence.

- [23] It is admitted that pursuant to the Sale Agreement made June 7, 2013 Ms. Stilinovic and Ms. Paton agreed to sell the Property to the Fritzes for \$800,000. It is also admitted that the Fritzes paid Ms. Paton a deposit in the total amount of \$50,000.
- [24] As I have already stated, Justice Kelleher found that the Sale Agreement remained in force after the July 15, 2013 closing date, as none of the parties were ready and willing to close. Justice Kelleher's order provided that either party could set a new closing date on reasonable notice.
- [25] It is admitted that on December 22, 2016 the Fritzes gave notice to counsel for Ms. Paton and Ms. Stilinovic of a closing date for the sale of the Property of February 2, 2017.
- [26] On January 6, 2017 Ms. Stilinovic executed a Deed of Gift transferring and assigning \$200,000 of her 50% share of equity in the Property to Ms. Fritz (the "Deed of Gift"). During her cross-examination Ms. Paton confirmed that she was aware of Ms. Stilinovic's intention to gift \$200,000 to the Fritzes as early as 2014.
- [27] On January 25, 2017 Ms. Paton's solicitor emailed Ms. Stilinovic's solicitor noting that there was still a mortgage charge on the Property in the amount of \$520,000 which would need to be paid from the sale proceeds. In this letter, contrary to the position he took later regarding distribution of net sale proceeds, Ms. Paton's solicitor suggested that after repaying the RBC Debt that the balance would need to be held in trust pending the agreement of the sellers and their lawyers as to how much goes to each.
- [28] In an email response dated January 26, 2017 Ms. Stilinovic's solicitor replied as follows:
- As well, Ms. Paton signed an agreement with her mother that she would be solely responsible for the RBC mortgage, I understand that it is some \$520k at present. Since the amount of the RBC mortgage is more than one half of the price for the property it means that her mother, Ms Stilinovic, is paying a large portion of the mortgage from her own 50% interest. Consequently, I do not believe that there is anything to pay out to Ms. Paton and all of the net sale proceeds ought to be paid to Ms. Stilinovic. Those net sale proceeds will not be very large since Ms. Stilinovic has made a gift of \$200,000 of her equity in the subject property to Elizabeth Fritz.
- [29] On January 26, 2017 the Fritz's solicitor delivered the seller's documents for review and signature to the solicitors for Ms. Paton and Ms. Stilinovic. These documents included a Form A Transfer, Bill of Sale, Seller's Statement of Adjustments, Notice of Transfer or Change of Ownership, GST Certificate and Certificate of Residency.
- [30] The Seller's Statement of Adjustments showed, under the "debit column", a credit of \$50,000 in respect of the deposit paid to Ms. Paton and a credit of \$200,000 in respect of the Deed of Gift, described as a "Credit to Buyer from Katarina Stilinovic portion".
- [31] On January 30, 2017 Ms. Paton's solicitor emailed the solicitors for Ms. Stilinovic and the Fritzes taking the position that the RBC Debt was shared equally between the parties and that Ms. Stilinovic's share of the proceeds after paying the RBC Debt would not be large

enough to allow for a \$200,000 credit against the purchase price and therefore this amount would have to be paid by the Fritzes. On January 31, 2017 Ms. Stilinovic's solicitor replied, enclosing documentation which he stated established that Ms. Paton was responsible for the RBC Debt. The documentation included a handwritten note dated October 28, 2007 and signed by Ms. Paton and an agreement between Ms. Paton and Ms. Stilinovic dated February 6, 2008, entitled "House Agreement".

[32] The October 28, 2007 handwritten note stated as follows:

[p]lease accept this letter as my statement to release Katarina Stilinovic from any debt relating to Sophie Paton's owed portion of the mortgage payable to the RBC for the [Property] as well as monies borrowed against the line of credit available through the homeline RBC Mortgage upon Katarina Stilinovic clearing/paying out her portion of the mortgage. I Sophie Paton take sole responsibility of all debts (mortgage & LOC) relating to the property and will continue to pay down as per my agreement with the RBC.

[33] It is admitted that on October 28, 2007 Sophie Paton agreed with Ms. Stilinovic to be solely responsible for all debts related to the Property and executed a hand-written note to that effect.

[34] The House Agreement recorded as Recital D that Ms. Stilinovic had repaid her 50% share of the then outstanding RBC mortgage. Under clause 2 the parties agreed not to seek further advances from RBC under the terms of the mortgage on the Property. Under clause 3 the parties agreed that Ms. Paton would be solely responsible for, and shall promptly pay all monies now due, or coming due, to [RBC] and would indemnify Ms. Stilinovic for any failure to pay amounts owing to the bank.

[35] It is admitted that on February 6, 2008 Ms. Paton and Ms. Stilinovic entered into the House Agreement outlining their respective responsibilities with respect to the expenses and debt related to the Property.

[36] It is admitted that in 2007, after Ms. Stilinovic had acquired Ms. Paton's then boyfriend's 50% interest in the Property and became half owner, that Ms. Stilinovic paid her portion of the RBC mortgage registered against the Property.

[37] On January 31, 2017, Ms. Paton's solicitor responded stating that his client's instructions were "clear" and "firm" that the Fritzes must provide his office with the full amount of the purchase price, which would first be used to repay the RBC Debt in its entirety and then remaining proceeds, subject to accounting for the deposit paid and other legal expenses, would be divided equally between Ms. Paton and Ms. Stilinovic.

[38] On February 1, 2017, Ms. Stilinovic's solicitor provided solicitors for the Fritzes and Ms. Paton with executed copies of the sellers' documents signed by Ms. Stilinovic, with the Sellers' Statement of Adjustments reflecting the \$200,000 credit to the Fritzes.

- [39] On February 1, 2017 Ms. Paton's solicitor wrote to the solicitor for the Fritzes, and copied the solicitor for Ms. Stilinovic, stating that " the gift is not part of the contract referred to by the judge, it is a side deal between your clients and the other seller."
- [40] On February 2, 2017, the Fritz's solicitor wrote to Ms. Paton's solicitor, confirming receipt of the executed sellers' documents from Ms. Stilinovic and advising that the Fritzes were ready, willing and able to close. Further, the Fritz's solicitor stated in his letter that although the Fritzes disagreed with what they considered to be Ms. Paton's position, that is that only \$140,000 of the \$200,000 gift should be applied as a credit to the purchase price, they were willing to pay, under protest, an additional \$60,000 in cash to complete the sale of the Property.
- [41] Later on February 2, 2017, Ms. Stilinovic's solicitor emailed Ms. Paton's solicitor highlighting the Fritzes willingness to contribute the additional \$60,000 to complete the transaction and seeking an undertaking from the solicitor for Ms. Paton that the proceeds remaining after discharging the RBC Debt would be held in trust by his office and not be released except by consent or court order.
- [42] Ms. Paton's solicitor responded by email at 3:53 pm on February 2, 2017, in effect explaining why Ms. Paton was refusing to accept the close:
- a) The \$200,000 "gift" included as a credit in the Seller's Statement of Adjustments was not part of the Sale Agreement;
 - b) That the Sale Agreement contemplated that \$750,000 would be paid to his firm to be used to pay out the RBC mortgage, adjust for the \$50,000 deposit and legal fees and then divide the balance, which in his calculation would see \$140,000 paid to Ms. Stilinovic and \$90,000 to Ms. Paton $((\$750,000 - \$520,000) / 2 + \$25,000 = \$140,000)$;
 - c) That it was not a term of the Sale Agreement (or the order of Justice Kelleher) that the sale proceeds be held in trust pending a further order from the court and Ms. Paton would not complete on the basis that an undertaking to put net sale proceeds into trust would be provided by him.
- [43] The sale-purchase transaction for the Property did not close on February 2, 2017.
- [44] During her testimony at the trial before Justice Kelleher in 2015, during her examination for discovery in this action conducted in April 2019 and during her cross-examination at this trial Ms. Paton admitted that she was solely responsible for the RBC Debt when she signed the handwritten note in 2007, which consisted of her \$300,000 share of the mortgage debt secured by the Property. She also confirmed that she remained solely responsible for an additional \$200,000 debt which arose from draws she made between 2007 and 2010 on an RBC line of credit secured by the Property - which draws she was not entitled to make under the terms of the House Agreement. Ms. Paton also confirmed that until she moved away from the Property in December 2013, she had only paid interest charges accruing on the RBC Debt in the amount of approximately \$300 per week and paid nothing towards this debt

afterwards.

- [45] It is agreed that on June 3 and 17, 2011 Ms. Stilinovic drew down \$10,000 and \$15,000, respectively, from the RBC line of credit. In addition, Ms. Stilinovic testified that upon learning in or about 2013 that Ms. Paton had been continuing to draw down on the RBC line of credit she was advised to "max out" the line of credit by withdrawing all available funds, which she did on October 15, 2013 by drawing an additional \$37,631.50. In total, Ms. Stilinovic drew \$62,631.50 from the RBC line of credit. She does not dispute that she was not entitled to make these draws under the terms of the House Agreement.
- [46] During her cross-examination at trial Ms. Paton confirmed that she always knew that she was responsible for paying her share of the RBC Debt. She agreed that in February 2017 she took a different position insisting that the property transaction be closed in a manner that required both her and Ms. Stilinovic's share of the purchase proceeds be used to pay off the RBC Debt.
- [47] Ms. Paton also confirmed during her cross-examination that the only withdrawals from the line of credit made by Ms. Stilinovic that she was aware of were those referenced above. She did not learn about these withdrawals until some time in 2019, well after the February 2017 closing date. Therefore, any concerns regarding who was responsible for paying the RBC Debt could not have been a basis for her refusal to close at that time.
- [48] Ms. Paton testified that she refused to sign the closing documents put before her by her solicitor in February 2017 because she had never agreed to sell the Property to someone who had received a gift from her mother. In her view the Seller's Statement of Adjustments, which sought to apply the \$200,000 gift from Ms. Stilinovic to Ms. Fritz as a credit against her share of the sale proceeds, constituted a different contract than the Sale Agreement which, Justice Kelleher found was enforceable.

Were the Fritzes Ready, Willing and Able to Close?

- [49] The Fritzes both testified that they were ready to proceed with the purchase of the Property on February 2, 2017.
- [50] As I have already stated, it is admitted that the Fritzes paid Ms. Paton a deposit totaling \$50,000. The evidence at trial establishes that prior to February 2, 2017 the Fritzes had secured funding from the TD Bank in the amount of \$500,000 and had arranged for an additional \$130,000 as the cash contribution required for them to complete the Sale Agreement. Accordingly, after application of the \$200,000 gift from Ms. Stilinovic as a credit towards the purchase price, the Fritzes had sufficient funds to close. Other than Ms. Paton's contention that the Fritzes were not entitled to apply the \$200,000 Deed of Gift as a credit, she has not challenged this evidence.
- [51] I am satisfied that the Fritzes were ready, willing and able to close on the purchase of the Property on February 2, 2017.

Did Ms. Paton have a legal basis to refuse to close?

- [52] As I have outlined above, in correspondence exchanged between the solicitor for Ms. Paton and the solicitors for Ms. Stilinovic and the Fritzes, Ms. Paton's solicitor set out three basis for refusing to close. In summary those reasons were:
- a) the \$200,000 "gift" from Ms. Stilinovic to the Fritzes was not part of the Sale Agreement;
 - b) the Sale Agreement contemplated that the sale proceeds would be used to pay out the RBC mortgage and after adjusting for the \$50,000 deposit paid to Ms. Paton and legal fees the balance would be divided and paid out to Ms. Paton and Ms. Stilinovic (divided \$90,000 and \$140,000 respectively); and
 - c) that it was not a term of the Sale Agreement (or the order of Justice Kelleher) that the sale proceeds be held in trust pending a further order from the court.
- [53] During closing submissions counsel for Ms. Paton conceded that Ms. Paton was and remains responsible for paying her share of the RBC Debt and did not dispute the calculation of the total debt and allocation of debt submitted by counsel for Ms. Stilinovic. Ms. Stilinovic's calculation is that as at July 2020 the RBC Debt totaled \$516,697.14, of which Ms. Paton was responsible for \$455,065.64 and Ms. Stilinovic was responsible for \$61,631.50.
- [54] I find that Ms. Paton should have had no expectation that she would receive anything from the net proceeds of sale from the Property after the RBC Debt was repaid - which all parties agree was to be paid from the sale proceeds. As was submitted by counsel for the Fritzes, given the amount of Ms. Paton's share of the RBC Debt, Ms. Paton was "under water" with respect to the Property in that she had no equity in it as at February 2, 2017.
- [55] The position taken by Ms. Paton's solicitor in the correspondence leading up to and on February 2, 2017, and Ms. Paton's testimony at trial, was that the statement of adjustments showing the \$200,000 Deed of Gift, and the implicit request that \$200,000 be applied as a credit against Ms. Stilinovic's 50% share of the Property, constituted in effect a "new contract". During closing submissions Ms. Paton's counsel advanced a somewhat different written and oral argument, submitting that Ms. Stilinovic had broken an "agreement she had with Ms. Paton by creating a scenario and insisting that Ms. Paton sell on terms that they agreed would not prevail." The alleged term was that Ms. Paton and Ms. Stilinovic had agreed that they would not sell the Property to someone receiving an equity gift.
- [56] When pressed to provide the evidentiary basis for such an agreement between Ms. Stilinovic and Ms. Paton, counsel suggested that such an agreement could be inferred by the Court.
- [57] I find that there was absolutely no evidence adduced at trial of such an agreement. Even if there was such an agreement I would not find that this would bind the Fritzes - who were in my view only required to be in a position to tender the funds to close, after all necessary adjustments. It may well be that Ms. Paton did not like the fact that her mother was contributing \$200,000 toward her half-sister's purchase of the Property, which as was

suggested by Ms. Stilinovic at trial Ms. Paton saw as a diminishment in the value of her mother's estate, but this was not a basis to refuse to close.

- [58] I do not find that when Ms. Stilinovic provided a Seller's Statement of Adjustments showing the \$200,000 Deed of Gift amount set off the purchase price, that this constituted a repudiation of the Sale Agreement by the Fritzes.
- [59] As tenants in common, Ms. Paton and Ms. Stilinovic each held a distinct and separate share of the undivided Property: see *Lonegren v. Ruben* (1987), 26 B.C.L.R. (2d) 327 (S.C.) at para. 31. Although in a joint tenancy there is unity of possession, this does not mean that there is necessarily unity of interest: *Anger & Honsberger Law of Real Property* (3rd Ed.), at §14:30
- [60] As a tenant in common and a 50% owner of an undivided interest in the Property Ms. Stilinovic was in my view within her rights to sell her share of the Property, as a separate legal estate, to the Fritzes, subject to the discharge of the RBC Debt secured against the entire property, at the purchase price of her choosing.
- [61] I find that Ms. Paton had no right to refuse to close on either of the following basis: that she had a separate agreement with Ms. Stilinovic not to sell to a party receiving an equity gift - which I have already found is not the case; or, on the basis that the credit for the \$200,000 Deed of Gift constituted a new contract or a contract amendment.
- [62] As a tenant in common Ms. Paton had no right to say what closing adjustments Ms. Stilinovic chose to grant when she disposed of her 50% interest in the Property. The Seller's Statement of Adjustments and other closing documents make it clear that the \$200,000 credit in respect of the Deed of Gift was to be applied to Ms. Stilinovic's share of the sale proceeds, after payment of the RBC Debt.
- [63] The Fritzes submit that even if the \$200,000 Deed of Gift had the effect of amending the Sale Agreement, Ms. Paton was obligated to act reasonably and in good faith to complete the transaction - given that the resulting \$200,000 purchase credit had no impact on her share of the net sale proceeds. In this respect the Fritzes rely upon the reasons in *Green v. Kaufman*, 1992 CarswellOnt 1756 at paras. 7-8 and *Buckweat Enterprises Inc. v Shiu*, 2001 BCSC 1727 at para 9.
- [64] Although I have already found that the attempt to seek a credit of \$200,000 against Ms. Stilinovic's share of the sale proceeds did not amount to an amendment of the Sale Agreement, had I found this to be the case I consider that Ms. Paton had breached her obligation to act reasonably with respect to completion of the necessary closing procedures for the sale of the Property. For example, she could have agreed to the proposal that the net sale proceeds, after payment of the RBC Debt, be put into trust pending the resolution of the dispute concerning how such net sale proceeds would be distributed to the vendors.
- [65] In conclusion, I find that Ms. Paton's refusal to close on February 2, 2017 was without any legal foundation and amounted to a repudiation of the Sale Agreement.

Is Ms. Paton Prevented from Advancing a Claim for Occupation Rent by Application of the Principles of Res Judicata, Issue Estoppel and Abuse of Process?

- [66] In her Counterclaim, filed in the previous action on May 15, 2015, Ms. Paton sought the following relief: "An order that Elizabeth, Allan and Katarina compensate Sophia for occupational rent."
- [67] As set out above, during the trial before Justice Kelleher in September 2016 Ms. Paton discontinued her counterclaim against Ms. Stilinovic for occupation rent on a without costs basis.
- [68] In her counterclaim filed in this action on August 1, 2018 Ms. Paton renewed her claim for payment of occupation rent against Ms. Stilinovic and the Fritzes. As I have already mentioned, Ms. Paton confirmed during this trial that she was not seeking an order for occupation rent against the Fritzes but only against Ms. Stilinovic, for the period December 13, 2013 (the date Ms. Paton moved from the Property) forward. During closing submissions counsel for Ms. Paton confirmed that, should the Fritz's claim for specific performance succeed, Ms. Paton was only seeking occupation rent from Ms. Stilinovic commencing February 2, 2017 forward.
- [69] Ms. Stilinovic contends that it is an abuse of process for Ms. Paton to seek to resurrect her claim for occupation rent, which she had discontinued at the start of the trial before Justice Kelleher.
- [70] In *Warford et al v. Zyweck et al*, 2002 BCCA 221, at para. 3 the Court of Appeal held that as a general rule there should be an expectation of finality flowing from the filing of a notice of discontinuance or abandonment. In my view this general rule applies equally in the context of an abandonment of a cause of action of trial.
- [71] In *Tyon Steepe Homes Ltd. v. Landon*, 2011 BCCA 162 the Court of Appeal stated as follows at para. 29:
- [29] The application of the doctrine of abuse of process has many of the same rationales, constraints and essential policy grounds of issue estoppel: finality to litigation, that one should be twice vexed by the same cause, and to uphold the integrity of the legal system to avoid inconsistent results: see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [2003 3 S.C.R. 77 (S.C.C.)] at para 38. Madam Justice Arbour expressed the view (at para 43) that the primary focus of the doctrine of abuse of process is the integrity of the adjudicative function of the courts. This was, in the end, the basis on which Balance J. determined that allowing the Counterclaim Defendants to litigate the defence of government delay that they decided to abandon in the Romfo Action would be an abuse of process in this case (para 98).

[72] In my view it would be an abuse of process to allow Ms. Paton to advance a claim for occupation rent against Ms. Stilinovic for the period between December 13, 2013 and February 2, 2017 - the date set by the Fritzes for completion of the sale of property, which date was set in accordance with the ruling of Justice Kelleher.

[73] As I have already stated, Ms. Paton concedes that if an order for specific performance of the Sale Agreement is granted, that she does not seek occupation rent from December 2013, but rather for the period February 2, 2017 forward. In this respect Ms. Paton advances what can arguably be described as a new claim for occupation rent - that is for the period after the February 2, 2017 closing date.

Does Ms. Paton's Claim for Occupation Rent Succeed or Fail on the Merits?

[74] Occupation rent is a discretionary remedy which may be utilized to obtain justice and equity in appropriate circumstances. It is an exceptional remedy which should be used cautiously: *Ross v. Ross*, 2013 BCSC 1716 at para. 47, *Piderman v. Piderman*, 2015 BCSC 475 at para. 53.

[75] As was stated by Madam Justice Humphries in *Dacyshyn v. Semeniuk*, 2007 BCSC 71 at para. 36 a "claim for occupation rent is brought in equity. It is trite law that a person seeking equitable relief must come to the court with clean hands."

[76] Ms. Paton seeks occupation rent for the period after February 2, 2017 - the date that the sale of the Property to the Fritzes should have closed had Ms. Paton not wrongfully refused to do so. It is admitted that Ms. Stilinovic was ready and willing to close the sale on February 2, 2017. Given that the only reason Ms. Stilinovic is still an occupying owner of the Property is because Ms. Paton wrongfully refused to close on February 2, 2017, it would be entirely inequitable to require her to pay occupation rent to Ms. Paton after that date.

[77] In addition, aside from the question of clean hands, Ms. Paton has not satisfied the common law test for occupation rent established by the authorities.

[78] In *Donovan v. Donovan* (1986), 7 B.C.L.R. (2d) 221 (S.C.), at para. 13, Justice Paris summarized the requirements for occupation rent as follows:

- (1) In the first instance, a co-tenant out of possession could not claim occupation rent because he normally had the right to go back into possession. (2) However, such a claim would be considered by the court if he had been required to vacate or was ousted from the property. (3) Furthermore, if the occupying tenant put forward a claim for expenditures made to the benefit of the property, ... he was required as a condition of that equitable relief to submit to a claim for occupation rent...regardless of whether or not the non-resident tenant had vacated the property voluntarily.

- [79] In closing submissions counsel for Ms. Paton conceded that the requirements for proof of ouster were not met in this case. I agree. The evidence establishes that Ms. Paton left the Property of her own volition in December 2013. There is also no evidence that Ms. Paton demanded access to or possession of the Property after February 2017 which was refused by Ms. Stilinovic or the Fritzes: see *Bankruptcy of Kostiuik, Re*, 2002 BCCA 410 at para. 43.
- [80] As stated by L.J.S.C. Huddart at para. 28 of *Bernard v. Bernard* (1987), 12 B.C.L.R. (2d) 75 (S.C.), unless there is ouster, an occupying owner will not be charged for his or her occupation unless he or she claims an allowance for his or her expenses. There is an obvious logic to this. It would be unfair to advance a claim for contributions towards the cost of maintaining lands whilst having the benefit of remaining on the lands for free. In such a case, a claim for occupation rent would have more validity. This situation does not apply in this case.
- [81] Ms. Stilinovic has not advanced a claim for expenses against Ms. Paton. This is despite the fact that since Ms. Paton moved off the Property in 2013 she has not contributed towards any of the costs of maintaining the Property and in fact has not made any interest and principle payments on the portion of the RBC Debt for which she is responsible.
- [82] Finally, even if I was to find that occupation rent is appropriate, which I do not find is the case, Ms. Paton has not provided any evidence of what an appropriate amount of occupation rent should be. There was no evidence at trial of damages such as, for example, the cost to Ms. Paton of obtaining alternate accommodation.
- [83] In conclusion, in respect of Ms. Paton's claim for occupation rent from February 2, 2017 forward, I do not consider that this claim has merit.

Payment of the RBC Debt

- [84] As I have stated above Ms. Paton admits that she is responsible for payment of her share of the RBC Debt. Ms. Paton's share of the RBC Debt includes her share of the RBC mortgage registered against the Property at the time that Ms. Stilinovic purchased a 50% interest in the Property in 2007 and any earlier or subsequent draws on the RBC lines of credit secured by the Property.
- [85] Also as stated above, Ms. Stilinovic admits and has testified that she drew a total of \$61,631.50 from the RBC lines of credit secured by the Property.
- [86] I find that both Ms. Paton and Ms. Stilinovic breached the terms of the House Agreement when they drew from the RBC line of credit. Despite this breach, the House Agreement should be given effect.
- [87] As I stated earlier, clause 3 of the House Agreement provides that Ms. Paton would be solely responsible for, and shall promptly pay all monies now due, or coming due, to RBC and would indemnify Ms. Stilinovic for any failure to pay amounts owing to the bank. This clause does not specify that Ms. Paton would be responsible for repaying amounts owing to

RBC for draws on the RBC Line of Credit by Ms. Stilinovic and it defies common sense to interpret the agreement in this way. I infer that the parties intended, and agreed in the House Agreement, that Ms. Paton would be responsible for her share of the RBC Debt, which does not include the \$63,631.50 amount drawn down on the RBC line of credit by Ms. Stilinovic, for which Ms. Stilinovic is responsible.

[88] In summary, I find that Ms. Paton's share of the RBC Debt, calculated to July 2020, is \$455,065.64 and Ms. Stilinovic's share of this debt calculated to the same date is \$61,631.50.

[89] Ms. Stilinovic submits, that an accounting in the context of the sale to the Fritzes on the terms of the 2013 Agreement, factoring in the \$200,000 Deed of Gift from Ms. Stilinovic, payment of the \$50,000 deposit to Ms. Paton by the Fritzes and the relative RBC Debt obligations of Ms. Stilinovic and Ms. Paton, results in Ms. Stilinovic receiving \$138,000 from the net sale proceeds from the Property, with Ms. Paton left owing Ms. Stilinovic \$105,065.

[90] A table setting out the accounting proposed by Ms. Stilinovic is set out below:

Ms. Stilinovic

Ms. Paton

TOTAL

New Purchase Funds

\$400,000.00

\$350,000*

\$750,000.00

(\$800,000 - \$50,000 deposit)

\$200,000 Deed of Gift to Ms. Fritz

-\$200,000.00

RBC Debt

-\$61,631.50

-\$455,065.64

-\$516,697.14

Net Funds Payable

\$138,368.50

-\$105,065.64**

*the difference in allocation of "New Purchase Funds" reflects the \$50,000 deposit paid directly to Ms. Paton by the Fritzes.

** the amount payable by Ms. Paton to Ms. Stilinovic

[91] Ms. Stilinovic submits that she should get judgment against Ms. Paton for \$105,065.64 under her Third Party Notice.[1]

[92] I accept the accounting proposed by Ms. Stilinovic and grant judgment to her in the amount of \$105,065.64 - payable by Ms. Paton. This amount will only be payable after the RBC Debt is paid from the proceeds of sale of the Property.

Conclusion

[93] Ms. Paton's claims for relief, as set out in her petition (Petition No. S171463) and her counterclaim filed in this action, are dismissed.

[94] The Fritz's claim for specific performance of the Sale Agreement is granted with a closing to occur within 90 days of the date of issuance of these reasons for judgment, subject to the further order of this Court or all of the parties agreeing to a later closing date.

[95] Subject to any necessary adjustments, on or before the closing date the Fritzes shall tender the balance of the purchase price for the Property, being \$750,000, less \$200,000 in respect of the Deed of Gift.

[96] The proceeds from the sale of the Property shall first be applied to pay the RBC Debt secured against the Property and any surplus, after deduction of any remaining closing costs, shall be paid to Ms. Stilinovic.

[97] Conditional upon the sale of the Property to the Fritzes completing and the repayment of the RBC Debt using the sale proceeds as outlined above, Ms. Stilinovic is granted judgment against Ms. Paton in the amount of \$105,065.64.

"Mayer J."

I note that the amount of the RBC Debt may increase from \$516,697, as a result of the accrual of additional interest between July 2020 and the date of judgement. As a result, the \$105,065 judgment awarded to Ms. Stilinovic may not reflect the actual amount of Ms. Paton's debt paid by Ms. Stilinovic using her share of sale proceeds. Nonetheless, I have accepted Ms. Stilinovic's proposed accounting. In addition, Ms. Stilinovic has not advanced a claim for interested payments she has made on Ms. Paton's portion of the RBC Debt since December 2013 and no judgment for such interest is made. [1]

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Prepared on 24 October 2026 · Esheria